Supreme Court, U.S.
FILED
JUL 17 1996
CLERK

No. 95-2022

In The
Supreme Court of the United States
October Term, 1995

MARC THRIY, et al.,
Petitioners,

v.

E. DEAN CARLSON, et al.,
Respondents,
and
UNITED STATES OF AMERICA
Intervenor.

On Petition For A Writ of Certiorari To The
United States Court of Appeals
For the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review the fact-based determination of two lower federal courts that Petitioners failed to establish that relocation of a gravesite will "substantially burden" their religious beliefs and practices under the Religious Freedom Restoration Act of 1993 ("RFRA"), 42 U.S.C. §§ 2000bb-1 — 2000bb-4.

2. Whether these courts properly defined "substantially burden" when they employed a test that was first articulated by this Court in a very similar case and was left untouched by the Congress when it passed RFRA.

3. Whether a state government's condemnation of property under procedures admittedly neutral and of general application violated Petitioners' first and fourteenth amendment "hybrid" rights by denying them the opportunity to be buried next to their daughter at the former location of her gravesite.

4. Whether Petitioners' request for an injunction has become moot if the activities they sought to stop have lawfully occurred.

PARTIES

PETITIONERS:	Marc Thiry, Diane De Fries Thiry, and The John D. De Fries Trust
RESPONDENTS:	E. Dean Carlson, Kansas Secretary of Transportation, Kansas Department of Transportation, City of Basehor, Kansas, City of Tonganoxie, Kansas, County of Leavenworth, Kansas
INTERVENOR:	United States of America

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CITATIONS OF THE OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS AND ORDERS ENTERED IN THE CASE

In addition to the official and unofficial reports cited in the Petition, the full court record includes:

SUPREME COURT:

Thiry v. Carlson, No. 95-2022 (U.S. May 17, 1996) (Order denying Petitioners' application for a stay).

TENTH CIRCUIT:

Thiry v. Carlson, 78 F.3d 1491 (10th Cir. 1996) (Tenth Circuit decision affirming the District Court).

De Fries Trust v. Carlson, No. 95-3178 (10th Cir. April 17, 1996) (Tenth Circuit Order denying Petition for Rehearing).

De Fries Trust v. Carlson, No. 95-3178 (10th Cir. April 17, 1996) (Order denying stay of mandate).

DISTRICT COURT:

Thiry v. Johnston, No. 94-2425 (D. Kan. Oct. 29, 1994) (Temporary Restraining Order).

Thiry v. Johnston, No. 94-2425 (D. Kan. Dec. 14, 1994) (Preliminary Injunction Order).

Thiry v. Carlson, 887 F. Supp. 1407 (D. Kan. 1995) (District Court's decision on the merits).

Thiry v. Carlson, 891 F. Supp. 563 (D. Kan. 1995) (Order granting Petitioners' motion for stay pending appeal and restoring

the preliminary injunction entered Dec. 14, 1994, pending appeal to the Tenth Circuit).

Thiry v. Johnston, No. 94-2425 (D. Kan. filed July 3, 1996) (Order denying plaintiffs' motion to enforce injunction pending appeal).

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Carlson v. The John D. De Fries Trust, No. 9412 CV 00679 (District Court of Leavenworth County, Kansas, May 10, 1995) (Order Approving Petition and Appointing Appraisers to determine damages).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

U.S. CONST. amend. I:

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; . . ."

U.S. CONST. amend. XIV, § 1:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . "

Religious Freedom Restoration Act of 1993, 42 U.S.C. §§ 2000bb-1--2000bb-4 (1993):

The full text of this act is included in the appendix of the Petitioners' Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents E. Dean Carlson, et al. respectfully request that this Court deny the petition for a writ of certiorari, seeking review of the opinion of the United States Court of Appeals for the Tenth Circuit in this case.

STATEMENT OF THE CASE

A. Background

Petitioners Marc and Diane De Fries Thiry, husband and wife, reside on a 151-acre parcel of land in Tonganoxie, Kansas, owned by Petitioner John D. De Fries Trust. As part of a state-wide safety improvement program the Kansas Department of Transportation ("KDOT")[1] offered to purchase a 4.12 acre tract of the Petitioners' land to improve U.S. Highway 24 between Tonganoxie and Basehor, Kansas by constructing a four-lane limited access highway in place of the current two-lane road.

For public safety reasons, and in order to provide greater access for local landowners, KDOT designed 150-foot "turnarounds" — extra wide medians — every two miles along the new highway. The basic purpose of the turnarounds is to per-

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[1] The City of Basehor, Kansas, the City of Tonganoxie, Kansas and the County of Leavenworth were named as defendants in the proceedings below (and are Respondents in this Brief in Opposition) because they entered into an agreement with KDOT. That agreement relates to the highway project but KDOT, acting through the Secretary of Transportation, acts as their agent with respect to this highway project. For simplicity's sake, this Brief in Opposition refers to the defendants/ Respondents, except for the United States of America, jointly as "KDOT."

mit long vehicles or vehicles pulling trailers to turn around safely without protruding into traffic lanes going either direction. KDOT considered several alternatives to the proposed design, but determined that constructing 150-foot turnarounds every two miles provided the safest design and affected the fewest adjoining homeowners. Condemnation of the 4.12 acre tract of the Petitioners' land is necessary to accommodate one of these turnarounds.

Petitioners initially objected to KDOT's condemnation citing concerns about wagon ruts and endangered species on the land. A biological study conducted by the environmental section of KDOT found no wagon ruts would be affected and no endangered species on the land. Petitioners then informed KDOT that the condemnation would violate their religious beliefs because it would require the relocation of a concrete encasement holding the cremated remains of their stillborn daughter. Petitioners alleged that the burial site was an area of religious significance to them and that relocation would violate their rights under the RFRA.

On June 21, 1996, after this Court refused to Stay the Judgment of the Court of Appeals for the Tenth Circuit denying all relief to Petitioners, and after giving them considerable opportunity to relocate the gravesite themselves, KDOT had the encasement professionally removed and preserved for reburial at a location of Petitioners' choice.

B. Proceedings Below

Petitioners filed a Complaint with the United States District Court for the District of Kansas, seeking to enjoin KDOT from commencing both condemnation proceedings and construction of the highway project. On October 28, 1994, Chief Judge Van Bebber of the United States District Court for the District of Kansas granted a Temporary Restraining Order restraining

KDOT from commencing condemnation of the tract in question. A hearing on the Preliminary Injunction was held December 13 and 14, 1994. In an Order filed December 16, 1994, Chief Judge Van Bebber restrained KDOT from taking immediate possession of the tract, but allowed it to initiate condemnation proceedings. A trial on the merits began March 20, 1995, which resulted in judgment for KDOT on all counts and dissolved the preliminary injunction.

On June 9, 1995, the ruling of the trial court to dissolve the preliminary injunction was stayed and the preliminary injunction was reinstated pending appeal to the United States Court of Appeals for the Tenth Circuit ("Tenth Circuit"). On March 15, 1996, the Tenth Circuit affirmed the judgment of the District Court, denying all bases for relief and holding that Petitioners' rights under RFRA would not be violated by the condemnation because the taking would not "substantially burden the free exercise of their religion." *Thiry v. Carlson*, 78 F.3d 1491, 1493 (10th Cir. 1996).

On April 17, 1996, the Tenth Circuit denied Petitioners' Petition for Rehearing and Suggestion for Rehearing En Banc. On May 17, 1996, Circuit Justice Breyer denied Petitioners' Application for Stay of Judgment. On June 14, 1996, Petitioners filed a Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit. On June 27, 1996, Petitioners filed a Motion to Enforce Injunction Pending Appeal with the District Court. Chief Judge Van Bebber denied that motion on July 3, 1996.

On December 15, 1994, KDOT filed an eminent domain petition in the District Court of Leavenworth County, Kansas. *See Johnston v. The John D. De Fries Trust, et al.*, No. 9412 CV 00679, slip op. (District Court of Leavenworth County, Kansas, Dec. 15, 1994). On May 10, 1995, the District Court granted an Order Approving Petition and Appointing Apprais-

ers to determine the damages. On July 11, 1995, KDOT paid the $20,000.00 condemnation award into the court, thereby completing the proceeding. Petitioners' appeal of the condemnation was dismissed with prejudice in an Order signed October 13, 1995, and filed June 21, 1996.

At the District Court, KDOT raised the issue of the constitutionality of RFRA, necessitating notification of, and intervention by, the Department of Justice. The District Court later found it was unnecessary to address the constitutional issue because Petitioners had failed to meet RFRA's threshold requirement that their religious beliefs had been "substantially burdened." Consequently, the Department of Justice has not continued to participate in the case.

C. Correction of Misstatements in the Petition

Petitioners' statement that KDOT's witnesses testified there were equally safe alternatives to the turnaround in issue is misleading. As the District Court noted, KDOT did consider three alternatives to the placement of the 150 foot-wide turnaround on Petitioners' tract, but rejected each as ineffective, too expensive, or too intrusive on other adjoining landowners. Regardless, analysis of the alternatives considered by KDOT is irrelevant because both the District Court and the Tenth Circuit found that Petitioners were unable to show a substantial burden, the threshold requirement before consideration of whether the planned design was the "least restrictive means."

Petitioners also misstate that they own unrestricted title to the tract in question. As indicated above, on July 11, 1995, KDOT paid a condemnation award into the Kansas state district court, thereby taking a permanent easement over the property. Petitioner's appeal of the condemnation was dismissed with prejudice in an Order signed October 13, 1995, and filed June 21, 1996.

Petitioners use of the word "destroyed" when describing what has happened to the site in question is both inaccurate and misleading. Petitioners were given ample opportunity to relocate the site to a place of their choice. Only when Petitioners willfully refused to relocate the site did KDOT have it professionally removed and preserved for reburial. Petitioners picked up the encasement the next day and are free to bury it on any of the remaining 146 acres of their farm.

REASONS FOR DENYING THE WRIT

Petitioners' only serious claim in this case is that relocation of the gravesite in question would violate their religious freedom rights under RFRA. Yet the District Court made several fundamental and essential findings of fact that formed the basis of its judgment that Petitioners had failed to meet RFRA's threshold requirement that any rights they were asserting would be "substantially burdened" by KDOT's activities. This fact-bound judgment was unanimously upheld by the Tenth Circuit in a similar, fact-based opinion. Regardless of any abstract interest the substantial burden issue might bring, it is impossible to dislodge this case from its unique and unpersuasive factual setting.

Nor does the abstract legal issue warrant the attention of the Court. Neither of the courts below had difficulty applying a substantial burden standard created by this Court in a very similar case. There is every reason to believe Congress was mindful of that standard when it enacted RFRA, and that it expected the same standard to be employed in RFRA-based litigation. There is no split among the Circuits, with most using the same standard employed below.

The case has also become moot. The action is, and has

always been, to enjoin KDOT from taking the site. That condemnation and accompanying appeal are both final, and the site has been lawfully taken for the highway project in question.

A. The Decisions Below are Fact-Bound.

The decisions of both lower courts turned on the District Court's factual findings, as each body recognized that RFRA imposes a burden on the plaintiff to prove "three threshold requirements: the [challenged] government action must 1) substantially burden 2) a religious belief rather than a philosophy or way of life, 3) which belief is sincerely held by the plaintiff." *Thiry v. Carlson*, 78 F.3d 1491, 1494 (10th Cir. 1996). While both the District Court and the Tenth Circuit found adequate proof that Petitioners' beliefs were religious and sincerely held, neither court found sufficient proof that the beliefs were "substantially burdened" by condemnation of their land and the gravesite's resulting relocation. 78 F.3d at 1495; *Thiry v. Carlson*, 887 F. Supp. 1407, 1413 (D. Kan. 1995).

The District Court made several specific factual findings upon which it based its ultimate conclusion that Petitioners' religious beliefs were not substantially burdened. It found that though the gravesite's former location held a "special meaning" for Petitioners, "their religious beliefs and practices will continue even if the planned highway is constructed." 887 F. Supp. at 1413. It also found that Petitioners had identified "no religious belief or tenet that would forbid in all situations the moving of a gravesite." *Id.* Indeed, Petitioners testified that they would agree to relocate the gravesite if they thought it was necessary for a safe highway. *Id.* From these findings, the District Court concluded that the proposed governmental action "would not impose a substantial burden" sufficient "to give rise to a claim under RFRA." *Id.*

The Tenth Circuit relied on many of the same facts em-

phasized in the District Court's opinion in also concluding that Petitioners' religious beliefs were not substantially burdened. *See* 78 F.3d at 1495-96 (citing portions of the trial transcript containing Petitioners' testimony that their religious beliefs would continue, that they had worshiped in areas other than the gravesite, and that Petitioners' religious views would permit them to agree to relocating the gravesite if Petitioners thought it was necessary for a safe highway). Based on these facts, the Tenth Circuit held the District Court did not err when it determined that Petitioners' rights were not "substantially burdened" by the proposed taking. *Id.* at 1496. In so doing, the Tenth Circuit was faithful to this Court's mandates that an appellate court give great deference to a trial judge's findings of fact. *See, e.g., Anderson v. Bessemer City,* 470 U.S. 564, 573-574 (1985) (appellate court may not reverse findings of fact when they are "plausible in light of the record viewed in its entirety" even when convinced "that it would have decided the case differently").

In sum, both the District Court and the Tenth Circuit held against Petitioners' RFRA claim because they failed to carry their burden to prove a "substantial burden." Reconsidering their careful evaluation of the evidence would produce nothing more than yet another evaluation — a third — of the evidence's adequacy under a well-established legal standard. In no way would that exercise resolve a significant legal question or contribute meaningfully to the clarity of legal doctrine in the federal courts. The Court should not devote its energy to such a fact-bound endeavor.

B. The Courts Below Used the Proper Definition of "Substantially Burdened" Under RFRA.

The application of RFRA to these facts originally portended several interesting legal issues. Among those were: (1)

whether the highway safety design at issue was part of a compelling state interest; (2) whether the particular construction design constituted KDOT's least restrictive alternative to remedy the safety problems; and (3) most intriguing, whether RFRA itself was constitutional.

None of those issues is implicated by this Petition, however, because both lower courts held that Petitioners could not meet the threshold test Congress established as a gateway to RFRA's protections. The plain language of RFRA requires that governmental action "substantially burden" the exercise of religion to invoke the statute's requirements. 42 U.S.C. § 2000bb-1. Both the Chief Judge of the District Court of Kansas and a unanimous panel of the Tenth Circuit found no such burden occurred under these facts. Thus, neither court reached the other, potentially more interesting issues.

This failure to meet their threshold burden has constrained Petitioners to ask this Court either (1) to overturn facts found by the District Court and upheld by the Tenth Circuit, or (2) to seek a change in the legal standard unanimously employed by both lower courts, a standard that tracks exactly with the constitutional precedents of this Court and is specifically left untouched by RFRA. The last subsection reflected the futility of the first line of attack; this subsection will reflect the futility of the second.

Both lower courts relied on this Court's last articulation of the constitutional meaning of "substantially burdened" in deciding Petitioners had not met RFRA's threshold standard. That articulation came, interestingly, "[i]n a case strikingly similar to [this one]." *Thiry v. Carlson*, 78 F.3d 1491, 1495 (10th Cir. 1996).

Lyng v. Northwest Indian Protective Ass'n, 485 U.S. 439 (1988), held that the federal government did not substan-

tially burden free exercise by building a road through land the plaintiffs considered sacred. In reaching its decision the Court noted that while the government's action made the plaintiffs' religious exercise more difficult, it had "no tendency to coerce individuals into acting contrary to their religious beliefs." 485 U.S. at 450. Earlier the Court had noted that the activity neither coerced the individuals into violating their beliefs nor "penalized religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." 485 U.S. at 449.

Together, these tests from *Lyng* represent this Court's articulation of the "substantial burden" standard. The substantial burden requirement was employed, though not defined, again in *Hernandez v. Commissioner,* 490 U.S. 680, 699 (1989), and *Employment Division v. Smith,* 494 U.S. 872, 883 (1989). It has not been altered by this Court, and both lower courts employed it in this case. 78 F.3d at 1495; 887 F. Supp. at 1412-13. As indicated in subsection A, neither court had difficulty finding Petitioners' alleged harm fell well short of the mark.

There are several persuasive reasons to conclude that Congress intended to adopt the *Lyng* standard when it passed RFRA several years after that decision. First, of course, by choosing the words "substantially burdened" as the threshold test to the statute's protections, Congress knew it was adopting the exact language employed by the Court in its most recent free exercise cases. That so, Congress both knew and expected that the language would be interpreted identically in RFRA claims as it had been in constitutionally-based decisions. *See* S. REP. No. 111, 103rd Cong., 1st Sess. 8 (1993).

That obvious point is underscored by the explicit purpose and legislative history of RFRA. By including the Purpose of the Act in Section 2, Congress took care to communicate that RFRA was passed "to restore the compelling interest test

as set forth in *Sherbert v. Verner* . . . *and Wisconsin v. Yoder* . . . to all cases where free exercise of religion is substantially burdened; . . ." 42 U.S.C. 2000bb(b)(1). While that statement makes very clear that Congress expected the state to meet a higher burden once a RFRA plaintiff proved his religious activities had been substantially burdened, it is equally clear the increased protection is triggered only *after the adherent has met that threshold standard.* Congress intended no change in existing jurisprudence prior to the shift in burden from adherent to government.

> This bill is . . . the restoration of the legal standard . . . applied in [pre-*Smith*] decisions. S. REP. No. 141, 103rd Cong., 1st Sess. at 9 (1993).

The final reason it is clear Congress expected the *Lyng* standard to apply to RFRA actions is that the holding mirrors the two prior Court decisions, *Sherbert and Yoder*, Congress cited in the body of RFRA as the models of jurisprudence it was restoring. 42 U.S.C. § 2000bb(b)(1). *Sherbert v. Verner* held an adherent could not be denied a benefit enjoyed by other citizens because of her religious observance. 374 U.S. 398 (1963). *Wisconsin v. Yoder* held an adherent could not be coerced into violating his religious beliefs. 406 U.S. 205 (1972). Fused together, these holdings — the twin pillars on which RFRA was constructed — exactly constitute the definition of "substantial burden" articulated in *Lyng*. 485 U.S. at 449.

The circuits have had little, if any, difficulty adjudicating RFRA's "substantial burden" test. Three circuits appear to have adopted tests identical to that used in *Lyng* and in the lower courts in this case. *Goodall v. Stafford County School Board,* 60 F.3d 168, 172-73 (4th Cir. 1995); *Cheffer v. Reno*, 55 F.3d 1517, 1522 (11th Cir. 1995); *Bryant v. Gomez*, 46 F.3d 948 (9th Cir. 1995) (per curiam). Two others have adopted what the

Seventh Circuit termed "a more generous definition." *Mack v. O'Leary*, 80 F.3d 1175, 1178 (7th Cir. 1996); *In re Young*, 82 F.3d 1407, 1418 (8th Cir. 1996).

Ironically for Petitioners in this action, the source of this second, "more generous" definition is the Tenth Circuit's opinion in *Werner v. McCotter*, 49 F.3d 1476 (10th Cir. 1995). Yet, in this appeal, the Tenth Circuit panel — which included Judge McKay, the author of the *Werner* opinion — hinted strongly that *Lyng* was the more appropriate standard. More important, it held that Petitioners had failed to meet the substantial burden requirement under either *Lyng* or *Werner*. 78 F.3d at 1495.

C. Petitioners Have No Valid Claim(s) Under Section 1983.

Petitioners have also raised a claim under 42 U.S.C. § 1983. While this claim has elusively shifted throughout the case, it seems now to stem from *Employment Division v. Smith*, where this Court suggested that strict scrutiny might be employed to neutral laws of general applicability if an adherent could establish that both a free exercise right and a second, separate fundamental right were substantially burdened. 494 U.S. at 881.

Both courts below gave short shrift to the claim, 78 F.3d at 1496; 887 F. Supp. at 1414-15, which was once two separate claims. 887 F. Supp. at 1414-1415. Regardless of its current posture, the claim merits little attention.

The first and most obvious problem is that the predicate of any such "hybrid" claim is a first/fourteenth amendment free exercise violation. Yet Petitioners have not explained how they can establish a free exercise violation if they can not even establish a statutory violation under RFRA. At the very least a first amendment claim would require Petitioners to prove that their free exercise had been "substantially burdened," returning them

to the jurisprudence that sank their RFRA claim.

Difficulties also abound with the amorphous "right" Petitioners offer as their second constitutional protection. The first, and terminal, difficulty is the District Court found Petitioners "failed to present evidence" that any constitutional rights would be violated by KDOT's activities. 887 F. Supp. at 1415. Even if there were evidence, Petitioners have yet to cite a single case establishing the claimed substantive due process right of "family unity and integrity." Finally, even if such a right existed, both courts below found as a matter of law it would not be violated by the project in question because Petitioners can still be buried by their daughter. 78 F.3d at 1496; 887 F. Supp. at 1415.

D. Petitioners' Claims Are Moot.

This action has always been solely to enjoin KDOT from removing the encasement and proceeding with construction. Yet the encasement has now been removed and preparation for construction has now begun. Thus, the final reason why this Court should deny the writ is that the facts have now changed and all original legal questions have become moot.

KDOT was enjoined from proceeding with the construction, though not the condemnation, of the tract in question during much of this litigation. Condemnation was completed in the summer of 1995. Petitioners appealed the condemnation, and a Journal Entry with Prejudice was signed on October 13, 1995, and filed on June 21, 1996. A copy of the Journal Entry with Prejudice is attached as Appendix A.

The Tenth Circuit entered its judgment against Petitioners on March 15, 1996. On April 17, 1996, the Tenth Circuit denied a request for rehearing and a suggestion for rehearing en banc. See Petitioners' Appendix F. On May 17, 1996, Justice

Breyer denied Petitioners' Application for a Stay of Judgment. On June 27, 1996, Petitioners filed a Motion to Enforce Injunction Pending Appeal with the District Court. Chief Judge Van Bebber denied that motion on July 3, 1996.

After two written requests that Petitioners remove the concrete encasement buried at the site, on June 21, 1996, KDOT arranged for professional removal of the encasement. Petitioners picked up that encasement the next day.

Because the encasement has been removed, and construction of the highway has begun, this controversy has thus become moot, not "admitting of specific relief through a decree of a conclusive character." *North Carolina v. Rice,* 404 U.S. 244, 246 (1971), citing *Aetna Life Ins. Co. v. Haworth,* 300 U.S. 227, 240-41 (1937).

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF LEAVENWORTH COUNTY, KANSAS

THE JOHN D. DE FRIES TRUST, ET AL., Plaintiff, vs. E. DEAN CARLSON, SECRETARY OF TRANSPORTATION OF THE STATE OF KANSAS, Defendant.	Case No. 9507 CV 391

Pursuant to Chapter 60 K.S.A.

JOURNAL ENTRY OF DISMISSAL WITH PREJUDICE

NOW on this 13th day of October, 1995, the same being a regular day of the District Court, this cause comes on to be heard on the joint motion of the parties for dismissal of this action, with prejudice, at the cost of the landowner.

IT IS THEREFORE BY THE COURT, CONSIDERED, ORDERED, ADJUDGED AND DECREED that this cause be and the same is hereby dismissed with prejudice at the cost of the landowner herein.

s/ David J. King
JUDGE

APPROVED BY:

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